STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM WROBLEWSKI,

Plaintiff-Appellant,

v

CITY OF SALINE,

Defendant-Appellee.

UNPUBLISHED
December 30, 2003

No. 243459
Washtenaw Circuit Court
LC No. 01-000281-CZ

Before: Talbot, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of summary disposition in favor of defendant on his claim of discrimination for his demotion and termination under the Whistleblowers' Protection Act (WPA), MCL 15.362 *et seq*., pursuant to MCR 2.116(C)(10). We affirm.

We review rulings on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "The determination whether the evidence established a prima facie case under the WPA is a question of law to be determined de novo." *Phinney v Perlmutter*, 222 Mich App 513, 553; 564 NW2d 532 (1997).

Section 2 of the WPA provides in part:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation. [MCL 15.362.]

"To establish a prima facie case, it must be shown that (1) the plaintiff was engaged in protected activity as defined by the Whistleblowers' Protection Act, (2) the plaintiff was discharged, and (3) a causal connection existed between the protected activity and the discharge." *Shallal v Catholic Social Services*, 455 Mich 604, 610; 566 NW2d 571 (1997).

> Under the WPA, the plaintiff has the initial burden of establishing by a preponderance of the evidence a prima facie case of discrimination. If the plaintiff succeeds, the burden shifts to the defendant to articulate some legitimate,

> nondiscriminatory reason for the adverse action. If the defendant carries this burden, the plaintiff must have an opportunity to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext for discrimination. The plaintiff may meet her burden of showing pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." [*Phinney, supra* at 563 (citations omitted).]

Plaintiff first alleges that the trial court erred in its determination that no genuine issue of material fact existed regarding whether plaintiff's alleged demotion was in retaliation for his whistleblowing activities. Plaintiff's argument is without merit. An employee who has reported or is about to report a suspected violation of law to a public body is engaged in alleged protected activity under the WPA where a causal connection exists between the activity and the adverse employment action. *Shallal, supra*. Plaintiff failed to establish a causal connection between any adverse employment action and his communications to a state agency in February 2000. *Id*. Also, because plaintiff's alleged demotion predated plaintiff's engagement in protected activity, it could not have been retaliatory action.

Moreover, the allegation that the "change" in classification from "building official" to "building inspector" resulted in a demotion is without merit. The label applied is not dispositive. See *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). Rather, the employment action must be materially adverse coupled with an objective basis for determining that the change is adverse. See *Wilcoxon v Minnesota Mining & Manufacturing Co*, 235 Mich App 347, 364-365; 597 NW2d 250 (1999). Plaintiff contends that the change in title altered his job security status, resulting in adverse employment action. Plaintiff's reliance on a national building code is without merit. The employment contract, signed by plaintiff, provided that his employment could be terminated without cause at any time. Irrespective of the provisions of the employment contract, defendant gave notice of its intent to terminate based on allegations rising to the level of just cause and gave plaintiff an opportunity to be heard. Therefore, the trial court properly granted summary disposition of his WPA claim based on an alleged demotion.[1]

Plaintiff next alleges that sufficient evidence to rebut the reasons for the termination were presented.[2] We disagree. Defendant's personnel policy expressly precluded use of sick leave for

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[1] We also note that plaintiff relies on an "inadvertently" taped recording of a communication with defendant's city manager to establish knowledge that he was about to report a violation. The city manager had no knowledge of the recording of this conversation. Admissible documentary evidence must be presented to create a genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Plaintiff has not addressed whether the conversation is admissible in light of the circumstances of the taping. In any event, the context of the conversation does not support plaintiff's position.

[2] Although seven reasons were cited in the notice of intent to terminate, plaintiff only takes issues with three that were identified as "significant" in the deposition of the city manager. However, because of our conclusion that plaintiff failed to meet his evidentiary burden, we do

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personal business and a violation could result in disciplinary action. Although plaintiff testified that his doctor took him off of work to perform medical tests, plaintiff acknowledged that he was paid for inspections that he performed in other cities during the sick leave period. Although plaintiff could not recall the exact times of those inspections, he acknowledged that they occurred during "daylight" hours. Accordingly, plaintiff failed to meet his burden of demonstrating pretext. *Phinney, supra*.[3]

Plaintiff also alleges that the after acquired evidence doctrine should act as a bar to the reasons offered by defendant to support the termination. We disagree. Application of the after acquired evidence rule presents a question of law that we review de novo. *Bruckner v McKinlay Transport Inc (On Remand)*, 225 Mich App 442, 448; 571 NW2d 548 (1997). An employer may not rely on after acquired evidence of employee wrongdoing in order to avoid liability for a discriminatory employment decision because the employer could not have been motivated by knowledge it did not have at the appropriate time. *Hazle v Ford Motor Co*, 464 Mich 456, 475 n 15; 628 NW2d 515 (2001). Under the circumstances of this case, plaintiff filed this litigation to challenge an alleged demotion under the WPA, but remained employed with defendant. Plaintiff continued to be employed by defendant at the time of his deposition, where wrongdoing by plaintiff was revealed. Based on this deposition testimony, defendant terminated plaintiff. Accordingly, plaintiff's claim is without merit. Defendant did not terminate plaintiff and then utilize information learned in the deposition to justify the decision. Rather, plaintiff remained employed by defendant while this litigation continued and, upon discovery of impropriety, defendant ended the employment relationship.

Affirmed.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Karen M. Fort Hood

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not address each individually cited reason.

[3] In the narrative portion of plaintiff's brief on appeal, it is alleged that the inspections were performed "after [plaintiff's] regular business hours for the City." However, plaintiff's deposition testimony did not corroborate that assertion. Although plaintiff also cites to an affidavit to support the allegation that the inspections were performed after hours, review of the affidavit reveals that it fails to address the time of any inspection. Thus, plaintiff failed to create an issue of fact with admissible documentary evidence. *Maiden, supra*. Furthermore, even if plaintiff's affidavit did address the time frame of any inspections, a party may not create a factual assertion by providing contrary information in an affidavit after giving damaging testimony in a deposition. *Gamet v Jenks*, 38 Mich App 719, 726; 197 NW2d 160 (1972).